

FEDERAL MAGISTRATES COURT OF AUSTRALIA

*EL DRAYHI v MINISTER FOR IMMIGRATION &
ANOR*

[2008] FMCA 1484

MIGRATION – Review of decision by Migration Review Tribunal – whether Migration Review Tribunal’s decision affected by jurisdictional error – whether the applicant had a genuine spousal relationship with his sponsor – whether the Migration Review Tribunal was obliged to have regard to the applicant’s allegations of domestic violence in relation to whether or not the applicant met the criteria required for a Partner (Temporary) (Class UK) visa.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.424A; 474; pt.8 div.2

Migration Regulations 1994 (Cth), reg.1.15A(1A); 1.15A(3); sch.2

Re Minister for Immigration and Multicultural Affairs; Ex parte

Durairajasingham (2000) 168 ALR 407

Minister for Immigration and Citizenship v Zaouk [2007] FCAFC 47

Sok v Minister for Immigration and Citizenship [2008] HCA 50

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs
(2006) 228 CLR 152

Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors (1996)
185 CLR 259

Abebe v Commonwealth of Australia (1999) 162 ALR 1

Veal v Minister for Immigration and Multicultural and Indigenous Affairs
(2005) 225 CLR 88

SZBYR v Minister for Immigration and Multicultural Affairs (2007) 235 ALR
609

SZKTI v Minister for Immigration and Citizenship (2008) 168 FCR 256

SZBYH v Minister for Immigration and Citizenship [2008] FCA 1157

SZKCQ v Minister for Immigration and Citizenship [2008] FCAFC 119

Applicant:

KHODOR EL DRAYHI

First Respondent:

MINISTER FOR IMMIGRATION &
CITIZENSHIP

Second Respondent:

MIGRATION REVIEW TRIBUNAL

File number: SYG 1575 of 2008
Judgment of: Emmett FM
Hearing date: 28 October 2008
Date of last submission: 28 October 2008
Delivered at: Sydney
Delivered on: 5 November 2008

REPRESENTATION

Applicant appeared on his own behalf

Counsel for the Respondent: Mr G. Johnson

Solicitors for the Respondent: Mr J. Pinder, DLA Phillips Fox

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 1575 of 2008

KHODOR EL DRAYHI
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Migration Review Tribunal (“**the Tribunal**”) dated 8 May 2008 and handed down on 21 May 2008.
2. The applicant is a citizen of Lebanon and is the ex-husband of an Australian citizen (“**the Applicant**”). The Applicant’s ex-wife is an Australian citizen by birth and sponsored the Applicant in his application for a spousal visa (“**the Sponsor**”).
3. The Applicant arrived in Australia on 2 April 2005.

4. On 21 October 2005, the Applicant lodged with the Department of Immigration and Multicultural and Indigenous Affairs (“**the Department**”) an application for a Partner (Temporary) (Class UK) visa. The application was accompanied by a Form 40SP “*Sponsorship for a partner to migrate to Australia*” signed by the Sponsor and statutory declarations signed by the Applicant and the Sponsor, both dated 19 September 2005.
5. On 27 February 2006, the Department received a letter from the Sponsor withdrawing her support for the Applicant’s visa application.
6. On 13 February 2007, a delegate of the First Respondent (“**the Delegate**”) refused the Applicant’s application for a Partner (Temporary) (Class UK) visa, and a Partner (Residence) (Class BS) visa.
7. On 22 February 2007, the Applicant lodged an application for review of the Delegate’s decision by the Tribunal.
8. On 8 May 2008, the Tribunal affirmed the decision of the Delegate not to grant a Partner (Temporary) (Class UK) visa.
9. On 19 June 2008, the Applicant filed an application in this Court seeking judicial review of the Tribunal’s decision.

The Applicant’s application for a Partner (Temporary) (Class UK) visa and the Delegate’s decision

10. The Applicant and the Sponsor provided Form 888 statutory declarations in support of the Applicant’s Partner (Temporary) (Class UK) visa application in which they stated:
 - a) They had begun a long distance relationship following the Applicant’s mother’s visit to Australia.
 - b) The Sponsor visited Lebanon to meet the Applicant in 2004 during which time they became engaged.
 - c) The Sponsor returned to Australia and the long distance relationship continued.

- d) The Applicant flew to Australia in February 2005 and they were married on 23 April 2005.
 - e) Following their marriage they lived together at the Applicant's brother's house and the Sponsor changed her surname to the Applicant's.
11. On 27 February 2006, the Department received a letter from the Sponsor withdrawing her support for the Applicant's visa application on the basis that they did not have a genuine and continuing relationship. The Sponsor claimed she had changed her address to the Applicant's for immigration purposes. She claimed that, at the Applicant's request, after the marriage she had continued to live with her parents while the Applicant lived with his brother. The Sponsor's relevant claims in this letter are as follows:
- a) On 30 March 2004 the Sponsor travelled to Lebanon to meet the Applicant and get to know him.
 - b) On 6 April 2004 the Sponsor and Applicant were engaged to be married.
 - c) In early May 2004 the Sponsor and Applicant completed paperwork in Lebanon for the Applicant to travel to Australia.
 - d) In mid May 2004 the Sponsor returned to Australia without the Applicant.
 - e) On 14 February 2005 the Applicant received his visa to travel to Australia.
 - f) On 2 April 2005 the Applicant travelled to Australia. The Sponsor stated that at this time *"everything started to change between me and [the Applicant]"* and he was strict and mistrustful.
 - g) On 23 April 2005, the Applicant and the Sponsor were married. At this time the Sponsor stated she was living with her parents and the Applicant was living with his brother.
 - h) The Applicant's visa was due to expire on 9 November 2005.

- i) The Applicant told the Sponsor to replace her surname with his and “*put all my personal details at he’s [sic] brother address*”, which she stated she did.
 - j) “*My life was destroy by the man I used to call my Fiancé left me in pain and scared for my life. As months went by I was still under the non freedom even though I was at my parents house... he started to hit me and slap me, after two days on the 17th of December 2005... ”.*
 - k) The Applicant’s Sponsor filed for a divorce on 17 December 2005. The Applicant said he would divorce her when he was granted the two year permanent residence in Australia.
12. The Sponsor requested the Department to withdraw the Applicant’s visa application as she was scared to be in the same country as the Applicant.
13. On 3 March 2006, the Department wrote to the Applicant informing him that it had received information that the relationship was no longer ongoing.
14. On 10 April 2006, the Applicant’s representative sent a fax to the Department attaching: a statutory declaration claiming he had suffered domestic violence from the Sponsor; a statutory declaration from a psychologist; a statutory declaration from a medical practitioner; and a medical certificate from another medical practitioner.
15. On 6 June 2006, the Department received a fax from the Applicant’s representative attaching a police report dated 8 March 2006. The Delegate’s decision noted that “*the report indicates that the sponsor had requested the applicant to pay half the cost of the divorce but the applicant has refused to do so. With regards to the domestic violence claimed, the report indicates that “there has been no physical assaults between the trio and the threats are minor in nature.”*”
16. On 6 September 2006, the Sponsor called the Department and made the following claims:
- a) She did not live with the Applicant.

- b) The Applicant had gone to her mother with the statutory declaration (Form 888) received by the Department on 20 October 2005 and requested her to sign it.
 - c) She was in fear for her safety from the Applicant.
- 17. On 28 September 2006, the Department interviewed the Sponsor by telephone, at which time she made the following claims:
 - a) They had never lived together in accordance with their religious beliefs and the Applicant lied when he stated they did.
 - b) The marriage had not been consummated.
 - c) The Applicant had persuaded the Sponsor and her mother to sign blank statutory declarations.
 - d) She changed her name because the Applicant “*forced*” her to and she had loved him.
- 18. On 6 November 2006, the Department received a faxed statutory declaration from the Sponsor stating she had never lived with the Applicant and had “*medical results to say that I have never been sexually active*”. Attached was a doctor’s certificate dated 13 October 2006 concluding the Sponsor was a virgin. That same day the Department recorded that it received a telephone call from the Sponsor in which she consented to this information being put to the Applicant. The Department noted that she reiterated that she had had “*nothing to do with the lodgement of the application... [and] did not write the statutory declaration written in her name with her signature*”.
- 19. On 8 November 2006, the Department sent a letter to the Applicant identifying the information provided to it by the Sponsor and inviting the Applicant to comment.
- 20. On 24 November 2006, the Applicant’s representative replied by letter and enclosed two statutory declarations in support of the Applicant’s claims that the Sponsor had lived with him at his brother’s address from April to December 2005. The Applicant also claimed that:

- a) The Sponsor's allegations that the relationship was not genuine, that she and the Applicant had never lived together and that the marriage was never consummated were false.
 - b) The statutory declarations of both the Sponsor and the Sponsor's mother had been handwritten by the Sponsor and her mother and witnessed by a Justice of the Peace.
21. On 13 February 2007, a delegate of the First Respondent ("**the Delegate**") refused the Applicant's application on the basis that the Applicant did not satisfy the criteria of any subclass for the Partner (Temporary) (Class UK) visa and the Partner (Residence) (Class BS) visa.
22. On 22 February 2007, the Applicant lodged an application for review of the Delegate's decision by the Tribunal.

The Tribunal's review and decision

23. On 19 November 2007, the Tribunal wrote to the Applicant inviting him to provide additional information in support of his claims in writing.
24. On 12 December 2007, the Applicant's representative sent a letter from a Sheikh indicating the Applicant and Sponsor had been divorced according to Islamic Sharia law before himself and witnesses on 2 March 2006.
25. On 2 January 2008, the Tribunal wrote to the Applicant informing him that the Tribunal had considered the material before it but was unable to make a favourable decision on that material alone. The letter invited the Applicant to attend a hearing on 11 February 2008 to give oral evidence and present arguments. The Applicant attended that hearing and gave evidence. His brother and sister-in-law were also present, as well as the Applicant's brother's friend. The Sponsor also attended the hearing and gave evidence, as did her Aunt.
26. On 13 February 2008, the Sponsor's Aunt wrote to the Tribunal enclosing further documents and submissions, in support of the Sponsor's claims including the Sponsor's divorce certificate.

27. On 18 February 2008, the Tribunal wrote to the Applicant informing him that the Tribunal had further considered the material before it but was unable to make a favourable decision on that material alone. The letter invited the Applicant to attend a further hearing on 26 February 2008 to give oral evidence and present arguments. The Applicant attended that hearing with two witnesses and gave evidence.
28. On 27 February 2008, the Department contacted the Sponsor by telephone and requested that she attend a hearing on 4 March 2008. The Sponsor attended that hearing with her mother and Aunt and again gave evidence under oath.
29. On 4 March 2008 and 6 March 2008 the Sponsor's Aunt wrote to the Tribunal enclosing further documents in support of the Sponsor's claims.
30. On 17 March 2008, the Tribunal wrote to the Applicant identifying information that may form part of the reason for affirming the decision under review, explaining its relevance and inviting the Applicant to comment upon it ("**the s.424A Letter**").
31. On 2 April 2008, the Applicant's representative wrote to the Tribunal in response to the s.424A Letter. The s.424A Letter also contained further documents and submissions in support of the Applicant's claims.
32. The Tribunal noted that it had before it the Department's file, the Delegate's decision record and other materials available to it from a range of sources.
33. The Tribunal found the Applicant was not a witness of truth.
34. The decision of the Tribunal is accurately summarised by the First Respondent in his written submissions as follows:

"12. The Tribunal gave a detailed summary of the evidence before it (CB274-281) before coming to its deciding reasoning at CB282-284. The Tribunal was not satisfied that, at the time of the application for the visa, the applicant was the "spouse" of the sponsor within the meaning of regulation 1.15A (CB282.2). It accepted that they were married and remained married (CB282.3), but the Tribunal was not satisfied that they had a mutual commitment to a shared life as husband and wife to the exclusion of all

others, or that their relationship was genuine and continuing (CB283.5-284).

13. *In so finding, the Tribunal was satisfied by medical evidence (Dr Bishara) that the sponsor was still a virgin 18 months after she married the applicant (CB282.7). It was further satisfied that the sponsor and the applicant had not engaged in sexual relations (CB282.8). The Tribunal found that the applicant had never intended that the couple live together as husband and wife (CB282.9), that they never resided at the same address (CB283.6; 283.9), or commenced a genuine spousal relationship following their marriage (CB283.7-283.8), and that the marriage was contrived for migration purposes (CB284.1).*
14. *Other evidence was referred to (including evidence from the applicant, evidence of relatives of the applicant, bank statements, photographs and other documents), but did not lead the Tribunal to any different conclusion. The weight to be given to the material before the Tribunal was, of course, a factual matter for the Tribunal.*
15. *The Tribunal not being satisfied that, as at the time of the application, “the relationship had the qualities referred to identified in R1.15A in that the relationship was not genuine and continuing and they were not mutually committed to a shared life as husband and wife to the exclusion of all others” (CB283.5; 284.1), the Tribunal was obliged to find, as it did, that the applicant was not the “spouse” within the meaning of reg 1.15A and could not meet clause 820.211(CB282.2; 283.5; 284).*
16. *The Tribunal had regard to all of the circumstances of the relationship as required by regulation 1.15A (see especially CB282.5; 283.5) and did not fail to make findings upon any component of the alleged circumstances that it was jurisdictionally obliged to decide.¹ Plainly, the circumstances of the relationship, on the Tribunal’s findings, included that the applicant “never intended that the couple live together as man and wife” (CB282.8), they never had sexual relations (CB282.7), they “never lived together” (CB283.6) nor did they “commence a genuine spousal relationship” after their marriage (CB283.75) and the marriage was contrived for migration purposes” (CB284.1)
... ”*

¹ c.f. the failure in *Li v MIAC* (2008) 102 ALD 354; [2008] FCA 902 (esp at [24]-[26]) to make a finding upon the claim that the couple intended to have a baby.

The proceeding before this Court

35. The Applicant was unrepresented before this Court, although had the assistance of an Arabic interpreter.
36. The Applicant confirmed that he relied on the grounds contained in the application filed on 19 June 2008. Those grounds are as follows:
- “1. The Tribunal failed to substantiate the claim made by the sponsor.*
 - 2. The Tribunal failed to accept the religious ceremony as a genuine marriage and that sexual relationship in itself does not constitute marriage.*
 - 3. The Tribunal failed to accept that the relationship between the couple, at the time of the application, was genuine and domestic violence issue was not pursued by the Tribunal.”*
37. Each of the grounds was interpreted for the assistance of the Applicant and the Applicant was invited to make submissions in support of each of the grounds and in support of his application generally. The Applicant confirmed that he had filed no other evidence or submissions in support of his application.

Ground 1

38. Ground 1 is a bare assertion and does not disclose any error capable of review by this Court.
39. When the Court asked the Applicant what he meant by this ground, the Applicant said that the Tribunal had wrongly accepted the evidence of the Sponsor that she had signed a blank statutory declaration.
40. However, a fair reading of the Tribunal’s decision makes clear that the Tribunal had noted the Applicant’s evidence that the Sponsor had completed the writing in her statutory declaration. The Tribunal also noted the evidence of the Sponsor that she did not have any involvement in the statutory declaration and had claimed that the writing and signature were not hers. A fair reading of the Tribunal’s decision makes clear that the Tribunal noted this conflict of evidence.

41. If the Applicant was intending to contend that the Tribunal was obliged to make a finding as to whether or not the Sponsor had written the statutory declaration or not, such a finding was not necessary. The Tribunal was obliged to consider the totality of the relevant evidence before it and make findings based on that evidence.
42. The question for determination by the Tribunal was whether or not it was satisfied that the Applicant met the criteria required for the Partner (Temporary) (Class UK) visa or the Partner (Residence) (Class BS) visa. Relevant to that determination was whether or not the Applicant was able to satisfy the Tribunal that he and the Sponsor had a mutual commitment to a shared life as a husband and wife to the exclusion of all others and that their relationship was genuine and continuing.
43. Regulation 1.15A(1A) of the *Migration Regulations 1994* (Cth) (“**the Regulations**”) imposed the following requirements on the Applicant in satisfying the Tribunal that he was entitled to the visa for which he had applied:

“Regulation 1.15A(1A) Persons are in a married relationship if:

(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and
[Emphasis added]

(b) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them is genuine and continuing; and

(iii) they:

(A) live together; or

(B) do not live separately and apart on a permanent basis.”

44. The Tribunal was satisfied that the Sponsor and the Applicant had entered into a valid marriage for the purposes of reg.1.15A(1A)(a)

However, the Applicant must also satisfy reg.1.15A(1A)(b) in order to be entitled to the visa for which he had applied.

45. In considering whether or not the Applicant's relationship with the Sponsor satisfied reg.1.15A(1A), the Tribunal noted that it had regard to all the circumstances of the relationship. In particular, the Tribunal referred to the relevant considerations set out in reg.1.15A(3) of the Regulations. Those considerations related to the financial aspects, the nature of the household, the social aspects and the nature of the persons commitment with each other.
46. Relevantly, clause 820.211 of Schedule 2 of the Regulations, identified the primary criteria that was required to be satisfied at the time of the decision. Fundamental to the criteria was that the Applicant be the spouse of the Sponsor. Ultimately, because the Tribunal found that the Applicant was never in a genuine spousal relationship with the Sponsor, the Applicant was not capable of satisfying the relevant criteria.
47. A fair reading of the Tribunal's decision makes clear that the Tribunal accurately summarised the documentary evidence of the Applicant and the Sponsor. The Applicant did not make any submission to the Court that the Tribunal's decision record did not accurately reflect the oral evidence of the Applicant and the Sponsor or their witnesses. In the circumstances, I accept as accurate the summary in the Tribunal's decision record of the evidence of the Applicant, the Sponsor and their witnesses.
48. The Tribunal accurately identified the relevant statutory criteria that the Applicant was required to satisfy and accurately summarised the Applicant's relevant evidence and material in considering that criteria. Having considered the relevant mandatory criteria, the Tribunal was not satisfied that the Applicant met the fundamental requirement that he had a genuine spousal relationship with the Sponsor at the time of the Tribunal's decision. Moreover, the Tribunal also found that no such genuine spousal relationship had existed at the time of the marriage or at any other time.
49. The Tribunal was entitled to accept the Sponsor's evidence in preference to the Applicant's evidence. The credibility of a witness is a matter "*par excellence*" for the Tribunal (*Re Minister for Immigration*

and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407 at [67] per McHugh J). In making its findings in accordance with the Sponsor's evidence, the Tribunal provided reasons for those findings that were open to it on the evidence and material before it.

50. The Tribunal's finding that it was not satisfied that the Applicant and Sponsor had ever actually lived together or had ever had a genuine spousal relationship led the Tribunal to find that the marriage was contrived for migration purposes and that the Applicant and the Sponsor did not at any time have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
51. Accordingly, ground 1 is not made out.

Ground 2

52. In relation to ground 2, the Applicant submitted that the Tribunal should not have accepted the evidence of the doctor that the Sponsor was a virgin because a girl can have an operation to create that impression. The Applicant informed the Court that he made that same submission to the Tribunal.
53. The Tribunal is obliged to make findings in accordance with the evidence. It was open to the Tribunal to accept the evidence of the doctor and the Sponsor that she had not engaged in a sexual relationship with the Applicant. Accordingly, the Tribunal's findings that the Sponsor was a virgin were open to it on the evidence and material before it and for the reasons it gave.
54. To the extent that ground 2 of the application appears to state that the Tribunal failed to accept the religious ceremony as a genuine marriage, such a complaint is misconceived. The Tribunal accepted that there had been a legal marriage. To the extent that the Tribunal did not find that there was a genuine relationship between the parties, as stated above, that finding was open to the Tribunal on the evidence and material before it and for the reasons it gave.
55. The complaint in ground 2 that the Tribunal failed to accept that sexual relationship in itself does not constitute marriage is also misconceived. The Tribunal did not at any stage make a finding that a sexual

relationship was required for a marriage or genuine spousal relationship. In other words, there was no finding by the Tribunal that a sexual relationship was essential to a genuine marriage or any finding to that effect.

56. The Tribunal did find that the marriage had not been consummated and that the Applicant and the Sponsor had never had a sexual relationship. However, a fair reading of the Tribunal's decision makes clear that the Tribunal did no more than take that matter into account in considering whether or not the Applicant and Sponsor were in a genuine spousal relationship.
57. As stated above in these Reasons, the Tribunal found that there was no genuine spousal relationship and that the Applicant had entered into the marriage for migration purposes. The Tribunal based that conclusion on its findings that the Applicant was not sincere about setting up a home, never intended to live with the Sponsor as man and wife and that, in fact, the couple had never lived together. As stated above in these Reasons, these findings were open to the Tribunal on the evidence and material before it and for the reasons it gave.
58. Accordingly, ground 2 is not made out.

Ground 3

59. In relation to ground 3, the Applicant submitted that the Tribunal had not looked at his situation and did not consider his allegation of domestic assault by the Sponsor.
60. However, a fair reading of the Tribunal's decision makes clear that the Tribunal had regard to the Applicant's evidence of alleged domestic violence by the Sponsor towards him. The Tribunal considered that issue in the following terms:

“On 10 April 2006, the Department received from the applicant's adviser documentary evidence from a psychologist and medical practitioner indicating that the applicant had suffered domestic violence and that the sponsor was the perpetrator of that violence. On 5 June 2006 also forwarded to the Department was a police report dated 8 March 2006. The report indicated that the sponsor had requested the applicant to pay 50% of their divorce

cost but he had refused to do so. In relation to the domestic violence issue, the report indicated that “there has been no physical assaults between the trio” (applicant, sponsor and sponsor’s father) “and the threats are minor in nature”.”

61. As stated above in these Reasons, cl.820.11 of Schedule 2 of the Regulations provides the criteria relevant to the Applicant’s visa application. In relation to the Applicant’s allegations of domestic violence, cl.820.211(8) and (9) have the effect that such allegations are relevant in the following circumstances:

62. Clause 820.211 (8):

“(8) An applicant meets the requirements of this subclause if:

(a) the applicant is the holder of a Subclass 300 (Prospective Marriage) visa; and

(b) the applicant has married the sponsoring spouse under a marriage that is recognised as valid for the purposes of the Act; and

*(c) **the relationship** between the applicant and the sponsoring spouse has ceased; and [Emphasis added]*

(d) any 1 or more of the following:

(i) the applicant;

(ii) a member of the family unit of the applicant who has made a combined application with the applicant;

(iii) a dependent child of the sponsoring spouse or of the applicant or of both of them;

has suffered family violence committed by the sponsoring spouse.”

63. Clause 820.211 (9):

“(9) An applicant meets the requirements of this subclause if:

(a) the applicant is not the holder of a substantive visa; and

(b) the applicant has been the holder of a Subclass 300 (Prospective Marriage) visa; and

(c) *while that visa was valid, the applicant married the sponsoring spouse under a marriage that is recognised as valid for the purposes of the Act; and*

(d) ***the relationship** between the applicant and the sponsoring spouse has ceased; and [Emphasis added]*

(e) *any 1 or more of the following:*

(i) *the applicant;*

(ii) *a member of the family unit of the applicant who has made a combined application with the applicant;*

(iii) *a dependent child of the sponsoring spouse or of the applicant or of both of them;*

has suffered family violence committed by the sponsoring spouse.”

64. The “*relationship*” referred to in cl.820.211(8) and (9) above means a “*spousal relationship*” (*Minister for Immigration and Citizenship v Zaouk* [2007] FCAFC 47 at [15]). Further, for cl.820.211(8) and (9) to be relevant there must have been a spousal relationship that has ceased.
65. Having found that there was no spousal relationship between the Applicant and Sponsor, cl.820.211(8) and (9) had no relevance. Otherwise, the Tribunal found that the Applicant did not meet any of the other relevant mandatory criteria required for the visa for which he had applied.
66. The High Court of Australia in *Sok v Minister for Immigration and Citizenship* [2008] HCA 50 (16 October 2008) (“**Sok**”) considered the obligations of a tribunal in relation to allegations of domestic violence made in the context of Division 1.5 of the Regulations. However, the High Court’s deliberations were confined to the circumstance where it was satisfied that there had been a genuine spousal relationship between an applicant and a sponsor at the relevant time. In *Sok* the court stated at [25] that “*where the decision under review is a decision to refuse the grant of a visa, the central question for the Tribunal will be whether, at the time the Tribunal makes its decision, the visa applicant is entitled to the grant of the visa that is sought.*”

67. Accordingly, in the circumstances before this Court, the Tribunal is obliged to consider whether at the time of its decision, the Applicant, relevantly, satisfies cl.820.211(8) and (9). The Tribunal is only obliged to consider whether the Applicant has suffered domestic violence if it is satisfied that the Applicant and the Sponsor had a genuine spousal relationship that had ceased.
68. However, the Tribunal in the case before this Court, was not obliged to consider whether the Applicant had suffered domestic violence or not because it found that the fundamental mandatory *genuine* spousal relationship had never existed at any time, let alone, ceased.
69. In the circumstances, as stated above in these Reasons, where the Tribunal concluded there was not and had never been any genuine spousal relationship, any domestic violence issue between the Applicant and the Sponsor was not capable of assisting the Applicant's eligibility for his visa because the Applicant and the Sponsor had never had a *spousal relationship* that had ceased. Therefore, the Applicant's allegations of domestic violence were not relevant to the Tribunal's decision to refuse the Applicant the visas which he sought.
70. The Applicant was on notice of the issue of the genuineness of his relationship with the Sponsor and whether or not his domestic violence allegations were relevant. To that end, the Delegate also was not satisfied that the requisite spousal relationship existed between the Applicant and the Sponsor at the time of the decision or at any other time and therefore the allegations of domestic violence were not capable of satisfying cl. 820.211(8) and (9). Accordingly, in the circumstances, it cannot be suggested that the Applicant was not aware that he may be required to address these issues at the hearing before the Tribunal (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [35], [37] and [47]).
71. To the extent that ground 3 asserts that the Tribunal "*did not look at his situation*", a fair reading of the Tribunal's decision record does not support such an assertion. The Tribunal's decision record summarises in detail all the evidence and material provided by the Applicant in support of his application. As stated above in these Reasons, no transcript was provided to suggest that the Tribunal's decision record was not accurate. The Tribunal raised its concerns with the Applicant

both in writing and at the hearing and considered the Applicant's responses. As stated above in these Reasons, the Tribunal's findings were open to it on the evidence and material before it and for the reasons it gave. The Tribunal made its conclusions based on those findings and applied the correct law to both.

72. Otherwise ground 3 is no more than a disagreement with the findings and conclusions made by the Tribunal. Such a complaint invites merits review which this Court cannot undertake (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors* (1996) 185 CLR 259 at 272; *Abebe v Commonwealth of Australia* (1999) 162 ALR 1)
73. Accordingly, ground 3 is not made out.

No other error

74. In discharge of the First Respondent's duty as a model litigant, Mr Johnson, counsel for the First Respondent, considered in his written submissions whether there was any other breach by the Tribunal in the making of its decision, including the conduct of its review. I accept the submissions of Mr Johnson to the effect that there was no error in the Tribunal's decision going to its jurisdiction. For the sake of completeness I refer to those submissions as follows:

"24. Nor did the Tribunal's procedure involve any jurisdictional error.

- 25. There is no transcript, but the Tribunal's reasons suggest that it canvassed its concerns quite thoroughly with the applicant. The delegate's reasons, in any event, plainly put in issue the existence of a "spouse" relationship (especially at CB171.4-171.6). As well as the Tribunal's account of the hearing before it, the respondent refers again to the letters sent by the Tribunal at CB195.5-195.8 and 258-260 raising this issue and the substance of information adverse to the applicant – as well as the indications in the hearing invitation letters (CB206 and 228) that the Tribunal was unable to make a favourable decision on what was before the Tribunal at the time that those letters were sent. There was no breach of section 360, understood in the light of SZBEL v MIMIA (2006) 228 CLR 152.*

26. *Nor was there any breach of section 359A of the Act as discussed in VEAL v MIMIA (2005) 225 CLR 88 at [11]-[12] and SZBYR v MIMA (2007) 235 ALR 609. Reference has already been made to the section 359A invitation at CB258-260.*
27. *With respect to the request by telephone to the sponsor and her mother to attend upon the Tribunal for further interview, no breach of section 359(3) occurred. The facts here are very different from SZKTI v MIAC (2008) 168 FCR 256,² where the Refugee Review Tribunal rang a witness without warning some time after a hearing seeking additional information over the phone that was relevant to the review. For the facts in the present case, see again paragraphs 5, 7 and 8 above. The spouse had already been summonsed to give evidence, and had given evidence, on a prior occasion. The telephone call was not an attempt to obtain on the spot any information relevant to the review. It was (as far as her evidence was concerned) merely a request for her to return for further interview at the same place to which she had been before. She could not in the circumstances have been in any doubt as the fact that she would be seeing the Tribunal and that information from her may be used in the applicant's review application. She agreed to attend. Also, it was through her that her mother's voluntary attendance was organised – but no information relevant to the review was sought (or obtained) from the mother over the phone. Further, the mother had been the subject of a request from the applicant that she be required to give evidence.³ In the telephone conversation, the spouse and her mother were simply agreeing to come to the Tribunal on another occasion to be interviewed. That did not involve the Tribunal exercising, or purporting to exercise, any power under section 359 which SZKTI might suggest may have required the procedure in section 359(3) to be followed. So too with respect to the aunt. No information relevant to the review was requested from the aunt over the phone and the note (CB240) suggests that the aunt returning to the Tribunal was entirely at the instigation of the spouse and/or her mother – not the Tribunal. There is no suggestion that any of these people did not know that they would be seeing*

²SZKTI is subject to a special leave application. It is formally and protectively submitted that SZKTI is wrong, but it is, of course, binding on this Court and the submissions of the respondent in this case assume (without concession) the correctness of SZKTI and Federal Court authority following it.

³SZBYH v MIAC [2008] FCA 1157 at [36] and the case there cited, SZBGI v MIAC [2008] FCA 599, suggest that section 424(3) – the RRT counterpart to section 359(3) – has no application where a witness is called at an applicant's request.

the Tribunal or that the Tribunal would be speaking to them in relation to the applicant's entitlement to a visa.

28. *Moreover, it is evident from CB241-242 that, when they did attend the Tribunal, the further evidence was taken on oath. That was an exercise of the Tribunal's power under section 363(1)(a) to "take evidence on oath or affirmation". That provision is the MRT-equivalent of section 427(1)(a) (which applies to the RRT). It is clear that SZKTI does not require use of the procedure in section 424(3) – or its MRT counterpart, section 359(3) – where the Tribunal is taking evidence on oath. The proposition that the power in section 427 to take evidence on oath is not affected by section 424 is clearly established (see SZBYH v MIAC [2008] FCA 1157 per Sundberg J at [33]-[37] and the authorities there quoted – SZKTI at [43] and SZKCQ v MIAC [2008] FCAFC 119 at [49] and [51]). So too, the equivalent (to section 427) power to take evidence on oath contained in section 363 is not affected by section 359."*

Conclusion

75. A fair reading of the Tribunal's decision makes clear that the Tribunal understood the claims being made by the Applicant; accurately summarised these claims; explored these claims with the Applicant; had regard to all material provided in support; raised concerns with the Applicant that the Tribunal had about his evidence and noted the Applicant's responses. The Tribunal made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and for which it provided reasons. A fair reading of the Tribunal's decision makes clear that the Tribunal reached conclusions based on the findings made by it and applied the correct law in reaching those conclusions.
76. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.
77. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no jurisdiction to interfere.
78. The proceeding before this Court is dismissed with costs.

I certify that the preceding seventy-six (76) paragraphs are a true copy of the reasons for judgment of Emmett FM

Associate: S. Kwong

Date: 4 November 2008